STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2009
v	No. 282484 Wayne Circuit Court
MARCUS TYRONE HIGHTOWER, Defendant-Appellant.	LC No. 07-013179-FC

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of intentionally discharging a firearm from a motor vehicle, MCL 750.234a, carrying a concealed weapon (CCW), MCL 750.227, third-degree fleeing and eluding a police officer, MCL 750.479a(3), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, second-degree child abuse, MCL 750.136b(3), two counts of felonious assault, MCL 750.82, and two counts of assault with intent to commit great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant to concurrent terms of two to four years' imprisonment for the discharge of a firearm from a vehicle conviction, the second-degree child abuse conviction, and each felonious assault conviction; two to five year terms of imprisonment for the CCW conviction and the fleeing and eluding conviction; and five to ten year terms of imprisonment for each assault with intent to commit great bodily harm conviction; all to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

We first address defendant's challenge to the sufficiency of the evidence supporting his convictions. We review sufficiency of the evidence challenges de novo to determine whether the evidence, viewed in the light most favorable to the prosecutor, warrants a rational trier of fact in finding that all elements of the charged crime have been proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). A reviewing court must "draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id*. at 400 (internal quotation omitted).

Defendant specifically contends that the prosecutor failed to prove his identity as the individual who committed the charged crimes, or the elements of felonious assault and assault with intent to commit great bodily harm less than murder. Our review of the record reveals

ample evidence supporting defendant's convictions. With respect to felonious assault, the prosecutor had to prove that defendant committed "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007).

The jury convicted defendant of two counts of felonious assault, one count each with respect to Detroit police officers Monica Evans and Deborah McComas. The officers related at trial that in the early morning hours of August 4, 2007, they drove past a burgundy Dodge Intrepid as its driver fired gunshots out of the Intrepid's passenger-side front window. Officer Evans identified defendant at trial as the Intrepid's driver. The officers turned their patrol car around and began a seven or eight block pursuit of the Intrepid that ended when they caught up to the Intrepid on the I-94 service drive, where it had crashed into a pole. According to the officers, as they assisted defendant's girlfriend and their infant child, who also occupied the car when it crashed, they heard three or four gunshots headed in their direction, which Officer McComas characterized as "extremely close" and in the "immediate area." On hearing the shots, the officers, defendant's girlfriend and the baby took cover, and the officers radioed that they were "under fire." The officers agreed that the shots had come at them from the freeway embankment or the freeway itself, below where the Intrepid was located. Officer Evans recounted that when she looked toward the area where the shots had originated, she saw in the "well lit" vicinity of the freeway defendant running with a limp across the freeway median and the distant freeway lanes. Officer Evans added that she participated in a foot pursuit of defendant on a bridge across the freeway, at which point she could see defendant from 30 to 40 feet away, "long enough to give out a very good physical description of exactly what he was wearing ["a black and white striped shirt, dark colored pants"], pretty much his height, build, everything."

Officer McComas retrieved from a lane on I-94 a run-over nine-millimeter handgun, and later recovered at the Warren Avenue location where defendant had fired at another vehicle a nine-millimeter shell casing. The police later learned that the Intrepid's registration bore defendant's name. An officer apprehended defendant shortly after the shooting, when he eventually received advice to look for defendant at 4410 Courville; there, defendant's brother directed the officer to a back bedroom where he found defendant on a bed near the white shirt with black or gray stripes described by Officer Evans, which fit defendant.

The evidence that defendant fired three or four gunshots toward the officers from a distance of between 30 to 40 feet, or 10 to 15 yards, supported the jury's rational determination beyond a reasonable doubt that with respect to each of the officers defendant committed "an attempt or threat with force or violence to do corporal harm to another (an assault)," *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), while intending to injure the officers or place them "in reasonable apprehension of an immediate battery." *Chambers*, *supra* at 8. And MCL 750.82(1) expressly contemplates that "a gun, revolver, [or] pistol" constitutes a dangerous weapon. Consequently, sufficient evidence supported defendant's felonious assault convictions.

The elements of assault with intent to commit great bodily harm less than murder are "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm *less than murder*." *Brown*, *supra* at 147 (emphasis in original, internal quotation omitted). The jury convicted defendant of two counts of assault with intent to commit great bodily harm less than murder, one each with respect to Officer Evans and Officer

McComas. By firing gunshots toward the officers, defendant committed an assault, as discussed above. Given the nature of the weapon defendant employed, an automatic firearm, together with the fact that he fired three or four shots at the officers from a relatively short distance of 10 to 15 yards, the evidence also supported the jury's rational determination beyond a reasonable doubt that defendant intended to inflict great bodily harm, or "serious injury of an aggravated nature." *Brown*, *supra* at 147 (internal quotation omitted). Therefore, sufficient evidence supported defendant's assault with intent to commit great bodily harm less than murder convictions.

Concerning the proof of defendant's identity as the charged criminal, the evidence at trial showed that the officers had the opportunity to see defendant, albeit briefly, when they first encountered him on an illuminated street firing gunshots out of the Intrepid. Officer Evans specifically identified defendant at trial as the Intrepid's driver. The officers briefly chased the Intrepid until it crashed and defendant fled the scene. However, Officer Evans spotted the Intrepid's driver running away across the "well lit" freeway, and began pursuing defendant on foot over a bride across the freeway that gave her a clear view of his physical build and clothing. Within the next hour or so, the police eventually located defendant in a bed in close proximity to the shirt Evans had described, which the arresting officer opined appeared too small for the other occupant of the residence. Furthermore, the officers learned that the burgundy Intrepid was registered in defendant's name. Although no one officer directly tracked defendant's movements after the Intrepid's crash, the evidence as a whole amply supported the jury's rational finding beyond a reasonable doubt that defendant committed the felonious assaults, the assaults with intent to commit great bodily harm, and all the other charged offenses.

Regarding the only other crime that defendant specifically contends lacked sufficient proof at trial, third-degree fleeing and eluding, this Court summarized the applicable elements as follows:

> [T]here are six elements necessary to establish third-degree fleeing and eluding: (1) the law enforcement officer must have been in uniform and performing his lawful duties and his vehicle must have been adequately identified as a law enforcement vehicle, (2) the defendant must have been driving a motor vehicle, (3) the officer, with his hand, voice, siren, or emergency lights must have ordered the defendant to stop, (4) the defendant must have been aware that he had been ordered to stop, (5) the defendant must have refused to obey the order by trying to flee from the officer or avoid being caught, which conduct could be evidenced by speeding up his vehicle or turning off the vehicle's lights among other things, and (6) some portion of the violation must have taken place in an area where the speed limit was thirty-five miles an hour or less, or the defendant's conduct must have resulted in an accident or collision . . . . [*People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999).]

Officer Evans and Officer McComas both testified that when they first encountered defendant they were wearing full Detroit police uniforms, and were driving along Warren Avenue in a police car bearing "DPD" markings. The police car also had its emergency lights activated because the officers were en route to another emergency. After seeing defendant shoot toward a vehicle next to the Intrepid, the officers turned around and pursued defendant's vehicle with their emergency lights and siren activated. According to the officers, over the course of at least seven or eight blocks defendant increased the speed of the Intrepid and failed to stop or

yield for several stop signs and a traffic light in a residential neighborhood, which the officers estimated that he traveled through at speeds in excess of 60 miles an hour. The Intrepid stopped only when it collided with a pole. We conclude that a rational jury could have found beyond a reasonable doubt that defendant had awareness of, but ignored, the uniformed officers' command to stop, embodied in their police cruiser's lights and sirens, by speeding away and disregarding stop signs and traffic signals posted in a residential neighborhood. Abundant evidence thus supported defendant's fleeing and eluding conviction.

Defendant next argues that the prosecutor engaged in misconduct during his rebuttal closing argument. This Court reviews properly preserved claims of prosecutorial misconduct according to the following standards:

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1371; 158 L Ed 2d 177 (2004).]

This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant asserts that the prosecutor improperly referenced evidence outside the trial record in the following portion of his rebuttal argument:

> The officers saw [] [d]efendant driving that vehicle. They saw him firing shots at another car. They saw him while they were chasing him. They saw him down on the freeway. Line-up? He was seen doing all these things and, in fact, he was arrested one hour later. Line-up? [] Defendant's girlfriend gave him up.

After a sidebar at which defense counsel placed an objection on the record, the prosecutor continued,

> As I said, the girlfriend gave the Defendant up. We know that while they were checking—while those officers were talking to her that she told them who he was, Marcus Hightower. They knew to go to a house because she told them that's where he was going and then they knew to go somewhere else to find him because one of her family members told the officers to go to Courville to find him and lo and behold he's there.

No testimony or other evidence admitted at trial established or reasonably tended to suggest that defendant's girlfriend "gave . . . Defendant up," as the prosecutor repeatedly maintained. The prosecutor's emphasis of this fact in his rebuttal argument thus improperly

injected a matter entirely lacking evidentiary support in the trial record. *Watson*, *supra* at 588; *Schutte*, *supra* at 721. However, we conclude that the prosecutor's inappropriate argument did not deprive defendant of a fair trial given that the improper assertions by the prosecutor appeared in brief fashion, the record contained a wealth of properly admitted evidence establishing defendant's guilt of the charged crimes, and the trial court cautioned the jury, in relevant part, as follows:

> I'm also going to ask that you . . . rely on . . . your collective memories in order to recollect the testimony of what you heard, okay.
>
> And because sometimes people will argue to you that perhaps things were stated when, in fact, they weren't. So you're going to have to rely on your own collective memories to determine what was the sum and substance of that testimony.
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> * * *
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> You must think about the testimony, think about the evidence and what you decide, ladies and gentlemen, is final.
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> * * *
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> To sum it up one more time, ladies and gentlemen, you are the ultimate triers of fact and what you decide is final.
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> * * *
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> Now, when you discuss this case and you decide on a verdict, ladies and gentlemen, you must consider that which was properly admitted into evidence . . . .
>
> Very simply stated, [evidence is] going to be the sworn testimony of the witnesses and any exhibits that come in. That's you're [sic] evidence. It's not what I say. It's not what the prosecution has stated. It's not what the defense has stated. It is the sworn testimony, plain and simple . . . .

See *Watson*, *supra* at 591-592 (finding no prejudice arising from an improper prosecutor appeal to jury sympathy because the comment was isolated and the trial court cautioned the jury not to be influenced by sympathy or prejudice).

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher